Supreme Court, U.S.
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No. 97-1564

In The

Supreme Court of the United States

October Term, 1997

THRIFTWAY MARKETING CORP.,
JERRY CLAYTON, and R.J. DALLEY,

Petitioners,

vs.

DAVID DEVANEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

Petitioners' first two arguments are both based upon misreading the New Mexico Supreme Court decision. In each instance, Petitioners misread the decision, then speculate about possible consequences of the decision as they read it, and then attempt to cast these hypothetical consequences as constitutional violations. The Petition does not present any reasons of the character normally considered in granting certiorari, and does not raise any important question of federal law. Indeed, Petitioners ask the Court to interfere in an area of law traditionally reserved to the states.

Petitioners' first argument is that consideration of whether adequate pre-filing investigation was done by a malicious abuse of process defendant will lead to an "intrusion upon the attorney-client relationship and the attorney's work product constitut[ing] a denial of the right to counsel." Petition, 7. Petitioners' basis for this contention is their belief that the decision below mandates broad inquiry into what the opposing attorney or litigant subjectively believed at the relevant time, based upon Footnote 2 in the Opinion. In fact, the language from Footnote 2 which Petitioners quote is not the standard the court below set, but one it distinguished. The quoted standard is the standard under the New Mexico counterpart to Rule 11 of the Federal Rules of Civil Procedure. Petition Appendix, 17 n. 2. The court below explained that the malicious abuse of process standard is *objective* reasonableness, while a subjective standard is applied under New Mexico's Rule 11.

Some inquiry into the reasonble pre-filing knowledge and belief of a litigant has always been a part of the tort of wrongful institution of legal proceedings. This includes inquiry into whether the litigant consulted with legal counsel and what information was provided to counsel. Restatement (Second) of Torts § 675, Comments *f*, *g* and *h*, pp. 460-461 (1977). Such inquiry does not unduly interfere with attorney-client privilege or the work product doctrine.

Likewise, this Court has held that a party's reasonable expectation of success and subjective motive for filing are relevant to whether its filing was "sham" litigation under antitrust law, and inquiry into those factors does not deny the right to counsel. *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

Finally, the objective standard involving consideration of whether there was reasonable pre-filing investigation, adopted by the court below, is similar to the standard of the federal Rule 11. Inquiry into pre-filing investigation need not interfere with attorney-client privilege or protection of work product, as is shown by the experience under that Rule.

Petitioners' second argument is that requiring them to show a reasonable pre-filing investigation of the law as a defense to a malicious abuse of process claim denies their right to equal protection, because the same would not be required of a litigant who had not been represented by counsel. Petitioners again misread the decision below. Nothing in the Opinion supports their assumption that a litigant who had filed *pro se* and was later sued for

malicious abuse of process would somehow be excused from showing a reasonable pre-filing investigation of the law. Again by analogy to Rule 11, the requirements of reasonable inquiry and good grounds logically apply to both an attorney and a party acting *pro se*. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991).[1] Thus, the classification to which Petitioners object on equal protection grounds does not exist.

In their third argument, Petitioners contend that this Court "established" a standard for probable cause for filing a lawsuit that is different from the standard set by the court below, citing *Professional Real Estate Investors, supra*. That case, however, did not establish a standard for state law torts such as malicious abuse of process. That case concerned the "sham" litigation doctrine of antitrust law. State tort law was cited for purposes of analogy and comparison.[2] *Professional Real Estate Investors* did not discuss or adopt "every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings" for transplantation into federal antitrust law. 508 U.S., 67 (Souter, J., *concurring*).

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[1] Indeed, the court below cited *Business Guides* and federal Rule 11, and distinguished the subjective standard it applies under New Mexico's counterpart to Rule 11. Petition Appendix, 17.

[2] The decision below does not differ substantially from the body of state tort law cited in *Professional Real Estate Investors*. The decision below cited *Professional Real Estate Investors*, and both that case and the decision below cited the Restatement (Second) of Torts, § 675. 508 U.S. 62-63; Petition Appendix, 17.

Further, setting federal standards for the tort of malicious prosecution would encroach improperly upon state law causes of action. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 551-552 (1991). State tort law reflects state policies regarding fee shifting and standards for compensation of parties who are victimized by litigation, and such matters are reserved to the states. *Id.*, 553; *Id.*, 567 (Kennedy, J., *dissenting*). Petitioners' request that the Court grant certiorari to modify the decision below seeks just such an encroachment upon matters reserved to the states.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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